1-15-2014

State v. Spicer Respondent's Brief Dckt. 40797

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. JEREMIAH DALE SPICER, Defendant-Appellant.	)	No. 40797 Ada Co. Case No. CR-MD-2008-2632

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature Of The Case

Jeremiah Spicer appeals from the district court's order revoking his probation. He also challenges the Idaho Supreme Court's order denying his motion to augment the appellate record.

Statement Of Facts And Course Of Proceedings

Spicer had sex with a 14-year-old girl who had run away from home. (PSI, pp.265-267[1].) The state charged him with statutory rape. (R., pp.59-60.) Spicer pled guilty to the charge. (R., p.77.) The district court imposed a unified 15-year sentence with six years fixed, but suspended the sentence and placed Spicer on probation for 20 years. (R., pp.77-84.)

Approximately a year later, the state filed a motion for probation violation. (R., pp.109-113.) Spicer admitted violating his probation by consuming alcohol, using methamphetamine multiple times, engaging in unauthorized sexual relationships, and by possessing pornography. (R., pp.109-113, 120.) The district court revoked Spicer's probation, but retained jurisdiction. (R., pp.128-130.) Following the period of retained jurisdiction, the district court suspended Spicer's sentence and placed him back on probation. (R., pp.138-142.)

Approximately a year and a half later, the state filed a second motion for probation violation. (R., pp.158-167.) Spicer admitted he violated his probation by being removed from the LIFE, Inc. residential treatment program for non-

[1] PSI page numbers correspond with the page numbers of the electronic file "SpicerPSI.pdf."

compliance with program rules, and by accessing the internet without authorization. (R., pp.158-167, 172; Tr., p.1, L.4 – p.12, L.4.) The district court revoked Spicer's probation and executed the previously imposed sentence. (R., pp.174-177.) Spicer timely appealed. (R., pp.176-180.)

Spicer then filed an amended notice of appeal requesting the preparation of transcripts of various hearings conducted prior to his second probation violation. (5/15/13 Amended Notice of Appeal.) The state objected to the notice, and the district court denied the transcript requests. (5/24/13 Objection; 6/10/13 district court "Order Denying Request For Certain Transcripts at Public Expense on Appeal.") After the appellate record was settled, Spicer moved to augment the record with most of the previously-requested and still-unprepared transcripts. (7/15/13 Motion.) The state objected, and the Idaho Supreme Court denied the motion. (7/17/13 Objection; 7/29/13 Order.) The Idaho Supreme Court also denied Spicer's subsequent renewed motion to augment the record. (9/9/13 Motion; 10/15/13 Order.)

ISSUES

Spicer states the issues on appeal as:

1. Whether the Idaho Supreme Court denied Mr. Spicer due process and equal protection when it denied his motion to augment the record with transcripts necessarily for review of the issues on appeal.

2. Whether the district court abused its discretion when it revoked Mr. Spicer's probation, or, alternatively, when it executed his sentence without modification when it did so.

(Appellant's Brief, p.5.)

The state rephrases the issues on appeal as:

1. Has Spicer failed to show that the Idaho Supreme Court violated his constitutional rights by denying his motion to augment the appellate record?

2. Has Spicer failed to show that the district court abused its sentencing discretion?

ARGUMENT

I.
Spicer Has Failed To Show That The Idaho Supreme Court Violated His Constitutional Rights By Denying His Motion To Augment The Appellate Record

A. Introduction

Spicer contends that by denying his motion to augment the appellate record with as-yet-unprepared transcripts of various hearings conducted prior to his second probation violation, the Idaho Supreme Court violated his constitutional rights to due process and equal protection and has denied him effective assistance of counsel on appeal. (Appellant's brief, pp.6-23.) Spicer has failed to establish a violation of his constitutional rights.[2]

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

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[2] Additionally, should this case be assigned to the Idaho Court of Appeals, that Court lacks the authority to review the Idaho Supreme Court's decision to deny Spicer's motion. State v. Morgan, 153 Idaho 618, 620, 288 P.3d 835, 837 (Ct. App. 2012). In Morgan, the Idaho Court of Appeals "disclaim[ed] any authority to review, and, in effect, reverse an Idaho Supreme Court decision made on a motion made prior to assignment of the case to [the Idaho Court of Appeals] on the ground that the Supreme Court decision was contrary to the state or federal constitutions or other law." Id. Such an undertaking, the Court explained, "would be tantamount to the Court of Appeals entertaining an 'appeal' from an Idaho Supreme Court decision and is plainly beyond the purview of this Court." Id.

C. Spicer Is Not Constitutionally Entitled To The Requested Transcripts

Spicer argues that he is entitled to transcripts of various hearings conducted prior to his second probation violation because, he claims, the failure to provide them is a violation of his constitutional rights to due process, equal protection, and the effective assistance of appellate counsel. (Appellant's Brief, pp.6-23.) The Idaho Supreme Court recently rejected similar arguments in State v. Brunet, 2013 WL 6001894 (Idaho 2013).[3]

In Brunet, the Court stated: "When an indigent defendant requests that transcripts be created and incorporated into a record on appeal, the grounds of the appeal must make out a colorable need for the additional transcripts." Brunet at 3 (citing Mayer v. City of Chicago, 404 U.S. 189, 195 (1971)). "[C]olorable need is a matter of law determined by the court based upon the facts exhibited." Id. In order to show a colorable need, an appellant must show "the requested transcripts contained specific information relevant to [the] appeal." Id. "[H]ypothesiz[ing] that the lack of . . . transcripts could prevent [the appellant] from determining whether there were additional issues to raise, or whether there was factual information contained in the transcripts that might relate to his arguments" does not demonstrate a "colorable need." In other words, an appellant is not entitled to transcripts in order to "search the transcripts for a reason to request and incorporate the transcripts in the first place." Id. Such an endeavor is a "'fishing expedition' at taxpayer expense" – an exercise the constitution does not endorse. In short, "[m]ere speculation or hope that

[3] Spicer did not have the benefit of the Court's opinion in Brunet when he wrote his brief.

something exists does not amount to the appearance or semblance of specific information necessary to establish a colorable need." Id.

Spicer contends that transcripts from his original change of plea hearing, original sentencing hearing, the admit/deny hearing from his first probation violation, the disposition hearing from his first probation violation, and his rider review hearing are relevant, regardless of whether they have been prepared or not, because "a district court is not limited to considering only that information offered at the hearing from which the appeal was filed" and that "the applicable standard of review requires an independent and comprehensive inquiry into the events which occurred prior to, as well as the events which occurred during, the probation revocation proceedings." (Appellant's Brief, pp.16-17.) It does not follow however, that an appellant who appeals a post-judgment revocation of probation has an automatic constitutional entitlement to a transcript of every hearing conducted throughout the entirety of a criminal case.

Although the appellate court's review of a sentence is independent, the review is limited, as noted in Brunet, to the "entire record available to the trial court at sentencing." 2013 WL 6001894 at 4 (citing State v. Pierce, 150 Idaho 1, 5, 244 P.3d 145, 149 (2010)). As in Brunet, the record in this case contains a voluminous amount of relevant sentencing materials including two presentence reports, relevant police and probation reports, and multiple psychological evaluations and incident reports from treatment providers and rehabilitative programs. (See PSI.) The record also includes minutes from each of the hearings from which Spicer has requested a transcript. (R., pp.57-58, 74-75,

124-127, 135-136.) "Therefore, the entire record available to the trial court at sentencing is contained within the record on appeal." Brunet at 4. As such, Spicer "has failed to demonstrate that he was denied due process or equal protection by this Court's refusal to order the creation of transcripts at taxpayer expense in order to augment the record on appeal." Id.

Although there may be some circumstances that require inclusion in the appellate record of transcripts of prior hearings to fully review the revocation of probation, Spicer has failed to show that any such circumstances apply here. There is nothing provided by Spicer that would indicate that what happened at the prior hearings, held between two and four years before the issuance of the decisions that are at issue on appeal, was considered or played any role in the district court's decision to revoke his probation. Spicer has not attempted to speculate as to why, specifically, these transcripts are relevant to his arguments on appeal (other than asserting, in general terms, that a district court may theoretically consider statements made at previous hearings when making sentencing determinations), much less demonstrate a colorable need for the requested transcripts. As such, Spicer's motions to augment the record with these transcripts constitute an impermissible "fishing expedition." See Brunet at 3.

Spicer next argues that "effective counsel cannot be given in the absence of access to the relevant transcripts." (Appellant's Brief, p.23.) This argument also fails. Addressing the claim that "refusal to order the creation of the requested transcripts for incorporation into the record" results in the

"prospective[]" denial of the effective assistance of counsel, the Court in Brunet concluded Brunet "failed to demonstrate how his counsel's performance fell below an objective standard of reasonableness without the requested transcripts," noting "the entire record available to the trial court at sentencing is contained within the record on appeal." Brunet at 5. The same is true in this case. "This record meets [Spicer's] right to a record sufficient to afford adequate and effective appellate review." Id. As such, Spicer has failed to show a Sixth Amendment violation based on the partial denial of his motion to augment.

Because Spicer failed to show a "colorable need" for any of the transcripts he was denied, assuming this Court addresses his claims that the denial of his motion to augment with those transcripts violated his constitutional rights, his claims fail.

II.
Spicer has Failed To Show The District Court Abused Its Sentencing Discretion

A. Introduction

Spicer contends the district court abused its discretion by revoking his probation, or alternatively, by declining to reduce his sentence upon revocation. (Appellant's Brief, pp.23-29.) A review of the record and the applicable legal standards demonstrates that the district court acted well within its sentencing discretion considering the serious nature of Spicer's underlying crime and his demonstrated inability to comply with the requirements of community supervision.

B. Standard Of Review

"A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion." Morgan, 153 Idaho at 622, 288 P.3d at 839. "Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. The Court Did Not Abuse Its Discretion By Revoking Spicer's Probation Or By Declining To Reduce Spicer's Sentence Upon Revocation

A trial court has discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; State v. Beckett, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); State v. Adams, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); State v. Hass, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Upton, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); Beckett, 122 Idaho at 325, 834 P.2d at 327; Hass, 114 Idaho at 558, 758 P.2d at 717.

Upon revoking a defendant's probation, a court may order the original sentence executed, or may reduce the sentence as authorized by Idaho Criminal Rule 35. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009) (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992); State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989)). A court's decision whether to reduce a sentence is reviewed for an abuse of

discretion subject to the well-established standards governing whether a sentence is excessive. Hanington, 148 Idaho at 28, 218 P.3d at 7. Those standards require an appellant to "establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing." State v. Wolfe, 99 Idaho 382, 384, 582, P.2d 728, 730 (1978). The reviewing court "will examine the entire record encompassing events before and after the original judgment," *i.e.*, "facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Hanington, 148 Idaho at 29, 218 P.3d at 8.

In this case, the district court decided to revoke Spicer's probation and to execute the underlying sentence without reduction after reviewing the case history, the presentence reports, and other relevant sentencing materials. (R., pp.174-177; Tr., p.15, L.7 – p.20, L.12.) This determination was reasonable in light of the serious nature of the underlying crime and Spicer's continued demonstrated inability to comply with the rules of community supervision.

When the district court gave Spicer a second chance at probation after the period of retained jurisdiction, it made it explicitly clear that it would not give Spicer a third chance should he continue to violate probation rules. The court amended "Special Condition 24" to read: "Defendant has had prior opportunities

for probation and a rider. The Defendant is advised that this is [his] final opportunity at probation. Failure to abide by the conditions of probation resulting in a motion for probation violation, will, if proven or admitted, be considered a violation of a fundamental condition of probation which will result either [sic] in imposition of the underlying sentence." (R., pp.139-140 (emphasis in original).)

In the course of this "final opportunity," Spicer continued to violate the terms of his probation. Numerous incident reports complied by employees of LIFE, Inc., the residential treatment program Spicer was ordered to participate in, document Spicer's issues controlling his anger and complying with program rules. (PSI, pp.53-80.) As summarized by his probation officer:

> Mr. Spicer continues to violate LIFE, Inc[.] rules as well as probation and parole rules. He claims he no longer wants to be in the community, feels he'd do better in a confined environment. He continues to show irresponsibility when given the opportunity to [prove] he can be self[-]sufficient and make the right choices. He deliberately is making these choices to violate his supervision, as he is aware that is the only way to get out of the LIFE, Inc[.] program. His aggression has increased and his ability to control his aggressions [is] decreasing. He threatens LIFE staff, flees without permission, does not obey lawful orders established by his supervising officers, and utilizes the internet, text message and picture mail as well as unauthorized relationships. With the defendant[']s increase in aggression, [and] desire to not be in the community he is a danger to himself and the community.

(R., pp.165-166.)

In addition to his issues complying with the rules of the LIFE, Inc. program, Spicer has admitted violating the terms of his probation by consuming alcohol, using methamphetamine multiple times, engaging in unauthorized sexual relationships, possessing pornography, and by accessing the internet without permission. (R., pp.109-113, 120, 158-167, 172.)

In light of Spicer's continued inability to comply with the rules of community supervision, and the serious nature of the underlying charge of statutory rape, the district court's decision to revoke Spicer's probation and execute the underlying sentence without reduction was entirely reasonable. Spicer has therefore failed to establish an abuse of discretion.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking Spicer's probation and executing the originally-imposed sentence.

DATED this 15th day of January, 2014.

MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of January, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

MARK W. OLSON
Deputy Attorney General

MWO/pm